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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER  
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

CASE NO. 3:18-MD-02843-VC

**DECLARATION OF ALEXANDER H.  
SOUTHWELL IN SUPPORT OF  
FACEBOOK, INC.'S STATEMENT IN  
SUPPORT OF SEALING MATERIALS RE:  
SPECIAL MASTER'S ADI HEARING**

1 I, Alexander H. Southwell, hereby declare as follows:

2 1. I am an attorney licensed to practice law in the State of New York. I am a partner  
3 with the law firm of Gibson, Dunn & Crutcher LLP. I submit this declaration in support of  
4 Facebook's Statement In Support Of Sealing Materials Regarding Special Master's ADI  
5 Hearing. I make this declaration on my own knowledge, and I would testify to the matters stated  
6 herein under oath if called upon to do so.

7 2. Attached as **Exhibit A** is a true and correct **redacted** copy of the transcript of the  
8 December 4, 2021 hearing before Special Master Garrie regarding the parties' dispute over  
9 production of ADI-related documents (the "Transcript"). The redactions are of material that is  
10 confidential, and for which public disclosure would harm Facebook, as explained below and in  
11 Facebook's Statement in Support.

12 3. Attached as **Exhibit B** is a true and correct **unreacted** copy of the Transcript.

13 4. Attached as **Exhibit C** is a true and correct **redacted** copy of Plaintiffs' presentation  
14 during the December 4, 2021 hearing before Special Master Garrie (the "Presentation"). The  
15 redactions are of material that is confidential, and for which public disclosure would harm Facebook,  
16 as explained below and in Facebook's Statement in Support.

17 5. Attached as **Exhibit D** is a true and correct **unreacted** copy of the Presentation.

18 6. Facebook initiated the Application Developer Investigation ("ADI" or the  
19 "Investigation") because, in the wake of the reporting of data misuse by Cambridge Analytica in  
20 March 2018, Facebook anticipated that it would have to respond to known and expected legal  
21 challenges in connection with applications and developers that may have had access to large amounts  
22 of user data because they were active before Facebook placed additional, significant limitations on  
23 the amount and type of data developers could request from users through the Facebook Platform in  
24 2014.

25 7. To this end, Facebook retained outside counsel (Gibson, Dunn & Crutcher LLP)  
26 experienced with cybersecurity and data privacy internal investigations to design and direct a new  
27 investigation (ADI) that could, among other things, gather the facts necessary for providing legal  
28 advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks facing the

1 company resulting from potential data misuse and activities by third-party app developers operating  
2 on the prior version of Facebook's platform.

3 8. I led the Gibson Dunn team engaged to develop and conduct the Investigation. I am a  
4 former federal prosecutor and have more than two decades of experience with large-scale, corporate  
5 investigations. The Gibson Dunn team worked with Facebook's in-house attorneys and members of  
6 Facebook's Partnerships, Data Policy, and DevOps teams on the ADI. I and my team at Gibson  
7 Dunn also led the recruitment and retention of technical experts and investigators for the ADI,  
8 including two leading forensic consulting firms with expertise in assisting with technology-focused  
9 internal investigations. These consulting experts operated as an extension of the Gibson Dunn team  
10 to support our provision of legal advice to Facebook, and the investigators worked under the direction  
11 of Gibson Dunn and Facebook Legal. The "ADI team," as used herein, is comprised of Gibson Dunn  
12 lawyers and paralegals, our consulting experts, and Facebook in-house counsel and internal partners  
13 including subject matter experts, all of whom operated at the direction of counsel. At its largest, the  
14 ADI team consisted of over 300 members.

15 9. Gibson Dunn and in-house counsel needed to partner with the outside expert  
16 consulting firms and Facebook personnel to effectively advise Facebook of legal risk. The ADI team  
17 worked at the direction of counsel, relied on counsel's input and guidance, and played a necessary  
18 role in facilitating legal advice by counsel and implementing that advice by the company. The ADI  
19 was an iterative process through which ADI team members, including counsel and subject matter  
20 experts, were able to learn as the investigation progressed. As such, documents initially drafted by  
21 members of the ADI team were generally prepared by or at the direction of counsel, and counsel  
22 edited or otherwise helped shape their contents to ensure they were serving the legal purpose for  
23 which they were created.

24 10. The Investigation was highly complex and addressed millions of applications  
25 operating before changes were made to Facebook's platform. There was no industry standard for  
26 how to conduct such an investigation. Rather, under Gibson Dunn's and in-house counsel's  
27 leadership, the ADI team devised and tailored the ADI's methods, protocols, and strategies to address  
28

1 the specific risks posed by these legal challenges. These proprietary methods and techniques are  
2 valuable to Facebook.

3 11. The methods, techniques, and strategies employed during the Investigation are highly  
4 confidential. Indeed, Facebook has taken numerous substantial steps to maintain the confidentiality  
5 of details regarding the Investigation. For example, details about the Investigation are disclosed to  
6 Facebook employees only on a need-to-know basis. As a result, a limited number of Facebook  
7 employees, counsel, and third-party experts have accessed this highly sensitive information.

8 12. The proposed redactions cover information that would reveal proprietary and highly  
9 confidential aspects of the Investigation. The Investigation was also privileged, and Facebook has  
10 produced ADI-related materials under compulsion over its assertions of attorney-client privilege and  
11 work product protection. Public disclosure of portions of the very information Facebook seeks to  
12 protect would cause Facebook to suffer irreparable harm by publicly disclosing aspects of Facebook's  
13 legal Investigation that Facebook has diligently worked to keep confidential and compromising  
14 Facebook's efforts to assert attorney-client privilege or work product protection over these materials  
15 on appeal or in other actions.

16 13. Facebook asks the Court to permanently seal the names of two consulting expert firms  
17 who assisted with the Investigation on a confidential basis, working at Gibson Dunn's direction. If  
18 these names were disclosed publicly, competitors would have access to confidential information  
19 regarding Facebook's business relationships with third-party experts. Public disclosure could  
20 undermine Facebook's and Gibson Dunn's current and future relationships with third-party vendors  
21 and be used to cause Facebook competitive harm. The Court has previously found good cause to seal  
22 this information. *See* Dkts. 737, 764.

23 14. Facebook also seeks to seal the identities of apps and developers that were  
24 investigated by ADI. If this information were publicly disclosed, these non-party apps and  
25 developers could suffer reputational harm because members of the public might infer that they had  
26 engaged in wrongdoing, when some apps were suspended for non-cooperation with ADI.

27 15. Facebook also seeks to seal limited portions of the Transcript and Presentation that  
28 reveal confidential information that has not been publicly disclosed regarding the number of audits

1 and interviews conducted by the ADI team and the number of background and technical reports  
 2 generated by Facebook's consulting experts. As previously stated, there was no industry standard for  
 3 how to conduct the Investigation, and the ADI team devised proprietary methods, protocols, and  
 4 strategies in conducting the Investigation that are valuable to Facebook. *Supra* ¶ 10. Public  
 5 disclosure of the number of reports, audits, and interviews conducted by the ADI team, as well as the  
 6 number of apps investigated and number of documents generated, would reveal confidential details of  
 7 ADI's investigative methods and strategies for ranking the relative risks of apps and developers and  
 8 determining what level of additional investigation is necessary. Facebook's competitors could use  
 9 this information to Facebook's competitive disadvantage when conducting their own internal  
 10 investigations into data misuse, gaining benchmarks for an appropriate level of investigation that  
 11 Facebook developed through significant investment. Bad actors could also use this information to  
 12 evade investigative and enforcement mechanisms Facebook has enacted to detect and disrupt abuse  
 13 of its platform.

#### 14 **Excerpts of Background and Technical Reports**

15 16. Facebook asks the Court to seal excerpts of background and technical reports  
 16 generated by Facebook's consulting experts during the Enhanced Examination phase of the  
 17 Investigation. In the Enhanced Examination phase, apps were selected for further review by counsel  
 18 through proprietary risk-based approaches based on counsel's assessment of where and how the  
 19 greatest legal risk to the company might arise to provide legal advice to Facebook regarding potential  
 20 risks and active and potential litigation. Once an app or developer had been identified for further  
 21 review based on criteria that my team had devised, Gibson Dunn and in-house counsel directed our  
 22 consulting experts to conduct intensive background and technical investigations, collect and compile  
 23 specific evidence that counsel believed particularly salient to their legal analyses, and report their  
 24 findings to counsel. Each report for a single developer could include extensive technical and other  
 25 details and these reports were specifically tailored by counsel, in substance and format, so that  
 26 counsel could evaluate the potential for data misuse and associated legal risks. Reports varied  
 27 tremendously based on counsel's instructions and what counsel determined was needed to provide  
 28

1 legal advice. Facebook continues to assert that these reports are attorney-client privileged and work  
2 product and has produced these reports under compulsion.

3 17. Enhanced Examination also included application of a proprietary model (called the  
4 Risk-Prioritization Formula) developed under the guidance and with the advice of counsel that  
5 assisted in assessing the risks related to access to data, and the associated legal risks to Facebook,  
6 based in part on the permissions granted to apps and the number of users that authorized specific  
7 permissions. The Risk-Prioritization Formula was used exclusively in the ADI to prioritize apps for  
8 review during the Enhanced Examination phase.

9 18. The background and technical reports excerpted in the Transcript and Presentation  
10 were created in the Enhanced Examination phase at the direction of counsel to assist counsel in the  
11 provision of legal advice and that contain or reveal the mental impressions and advice of counsel.  
12 Facebook produced the background and technical reports under compulsion, over its privilege and  
13 work product objections. As noted above, Gibson Dunn worked directly with the rest of the ADI  
14 team to design ADI-specific investigation reports to contain information relevant to counsel's  
15 evaluation of the potential for data misuse and associated legal risk.

16 19. **Background reports.** Counsel designed the background reports to capture  
17 information counsel deemed relevant to assessing the risk of data misuse and legal risk to Facebook.  
18 These reports varied in content depending on the particulars of the investigation, as directed by  
19 counsel. For example, Gibson Dunn and Facebook's in-house legal team often sought different  
20 information from different types of developers (e.g., corporate vs. individual), when providing legal  
21 advice.

22 20. **Technical reports.** Counsel devoted substantial time with the rest of the ADI team, to  
23 work through the technical information available about apps and developers on Facebook's platform,  
24 understand the significance of that data, and weigh the value of various technical details to our legal  
25 risk analysis. With our ADI consulting experts, we identified which details were most relevant to our  
26 legal risk analysis for inclusion in the reports. When we needed a more nuanced understanding about  
27 the data to render our legal advice to Facebook, working with our technical experts, we designed  
28 proprietary analytics (that had not before existed at Facebook and were used exclusively in ADI) in

1 order to score, rank, and better understand the available data. Because our counsel team consistently  
2 had questions about certain data points to assist in the rendering of legal advice, over time, those  
3 questions were built into the structure of the reports, so that counsel would have the answer at their  
4 fingertips to streamline their legal decision-making process.

5 21. To facilitate our attorney review at scale, we instructed the ADI team regarding the  
6 criteria and information that were important to us in rendering our opinion on legal risk, and  
7 requested that they, based on these attorney-selected criteria, include preliminary recommendations in  
8 their reports to facilitate Gibson Dunn's legal advice about the risk of data misuse. Therefore, the  
9 excerpts of each report reveal the criteria and information that were important to the ADI team's  
10 innovative and proprietary analyses.

11 22. Although counsel may not have drafted each of these documents directly, the excerpts  
12 of the documents created as part of the Enhanced Examination phase were created at the direction of  
13 counsel, reflect attorney advice and mental impressions regarding the evidence counsel deemed  
14 important in rendering legal advice, and were directly used by counsel to provide legal advice to  
15 Facebook.

16 23. Each background or technical report is focused on a specific developer or set of apps  
17 investigated by ADI and is replete with sensitive business information about third parties. The  
18 background and technical reports were intended to identify potential concerns about third-parties for  
19 counsel to investigate. In some cases, the concerns identified were disproven based on additional  
20 evidence gathered by the ADI team. Disclosure of the excerpts of these reports would reveal  
21 confidential and highly sensitive information about third parties and—in some cases—cause public  
22 disclosure of information that has not been subject to confirmation or verification. The reports  
23 should be sealed to protect the rights of non-parties.

24 24. Public disclosure of excerpts of the background and technical reports could also create  
25 security risks. The Investigation was designed to identify applications that may have misused data  
26 before Facebook implemented additional platform protections. Excerpts of the background and  
27 technical reports reveal what information counsel deemed relevant to assessing the potential for data  
28 misuse, as well as the tools and capabilities of consulting experts in investigating that information.

1 Data misuse and other abuse practices by app developers can be adversarial in nature, meaning that  
 2 bad actors commonly attempt to evade technological, investigative, and enforcement mechanisms  
 3 designed to detect and disrupt abuse. As a result, Facebook has strictly maintained the confidentiality  
 4 of ADI details to ensure bad actors cannot use that information in attempts to evade the additional  
 5 restrictions on data access that Facebook has enacted. If publicly disclosed, the sensitive information  
 6 contained in the excerpts could make Facebook's enforcement efforts less effective, which would  
 7 cause harm to Facebook and its users.

8 25. Excerpts of the background and technical reports also contain confidential information  
 9 about the Investigation's novel methods, processes, and strategies designed and developed by counsel  
 10 in anticipation of litigation. Public disclosure of excerpts of the reports would reveal highly sensitive  
 11 information, such as (i) the identities of the apps and developers that were investigated during the  
 12 Investigation, (ii) the information that counsel directed its consulting experts to investigate for certain  
 13 apps or developers, (iii) the capabilities of the consulting experts in conducting their investigation, or  
 14 (iv) the Investigation's risk assessment for certain apps and developers. Public disclosure of the  
 15 Investigation's targets, strategies, methods, and capabilities would allow Facebook's competitors to  
 16 copy these proprietary, innovative methods and techniques that Facebook and its counsel developed,  
 17 which would cause Facebook competitive harm.

18 26. For these reasons, the information redacted in the Transcript and Presentation is  
 19 protected from public disclosure by Federal Rule of Civil Procedure 26(c).

20 \* \* \*

21 I declare under penalty of perjury under the laws of the United States of America that the  
 22 foregoing is true and correct. Executed on January 21, 2022 in New York, New York.

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25 \_\_\_\_\_  
 26 Alexander H. Southwell  
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